

ST 01-31
Tax Type: Sales Tax
Issue: Tangible Personal Property

STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
SPRINGFIELD, ILLINOIS

THE DEPARTMENT OF REVENUE)	Docket #	99-ST-0000
OF THE STATE OF ILLINOIS)	IBT #	0000-0000
)	NTL #	
v.)		
)		
ABC COMPANY)	Barbara S. Rowe	
Taxpayer)	Administrative Law Judge	

RECOMMENDATION FOR DISPOSITION

Appearances: Special Assistant Attorney General Jim Day on behalf of the Illinois Department of Revenue; Barber, Segatto, Hoffe, and Hines by Carl O. Hoffe, on behalf of ABC Company.

Synopsis:

This matter comes on for hearing pursuant to the timely protest of ABC Company (hereinafter referred to as the "Taxpayer") of the Notice of Tax Liability for assessment of local sales tax, penalty, and interest for the period of October 1997 through February 1998. The assessment was on the taxpayer's sales of tangible personal property in the form of made-to-measure men's suits, shirts, and other wardrobe items. A hearing on a stipulated record was held in the Department's Springfield office. The issue in this matter is whether the Department is estopped from collecting the tax at issue. After a thorough review of the facts and law presented, it is my recommendation that the liability in question be upheld. In support thereof, I make the following findings and conclusions in accordance with the requirements of Section 100/10-50 of the Administrative Procedure Act (5 ILCS 100/10-50).

FINDINGS OF FACT:

1. The *prima facie* case of the Department inclusive of all jurisdictional elements was established by the admission into evidence of the Notice of Tax Liability, the stipulation, the EDA-105

audit report, and the SC-10-K audit correction and/or determination of tax due. (Dept. Ex. Nos. 1 through 4; Tr. p. 6)

2. On June 29, 1999, the Department issued a Notice of Tax Liability to the taxpayer in the amount of \$38,680.00. The only amount at issue herein is tax due of \$31,175.00 plus penalties and interest for the months of October 1997 through February 1998. (Dept. Ex. Nos. 2, 3 and 4)

3. The tax due in this matter is attributable to the taxpayer's payment of sales tax at the base state rate of 6.25% without payment of additional local sales tax. (Dept. Ex. No. 2, Stip. ¶ 2)

4. The taxpayer's payment of sales tax at the base state rate of 6.25% was limited to the period from September 1997 through February 1998. (Dept. Ex. No. 2, Stip. ¶ 3)

5. During the time period in question, the taxpayer had two physical locations in Illinois; one in Anywhere, and the other in Anywhere. The locations serve as office space from which sales professionals operate and from which clothes are delivered to customers in Illinois. (Taxpayer's Ex. Nos. 1 & 4)

6. For the taxpayer's September 1997 tax liability, recorded on the ST-1 Sales and Use Tax Return, the form submitted was revised from the one submitted for August 1997. In the area under "Step 2: Figure your tax on receipts; Sales from locations within Illinois; General Merchandise", the words "not applicable" are typed into the entry blanks at subsections 4a and 4b. (Taxpayer's Ex. No. 3)

CONCLUSIONS OF LAW:

The Retailers' Occupation Tax (hereinafter referred to as the "ROT") Act imposes a tax upon persons engaged in the business of selling at retail tangible personal property. 35 ILCS 120/2 The Home Rule Municipal Retailers' Occupation Tax (hereinafter referred to as the "HRM/ROT") Act allows municipal corporate authorities to impose a tax upon all persons engaged in the business of selling tangible personal property at retail. The tax is imposed on the gross receipts from the sales made in the course of business in the municipality. The Department in conjunction with the ROT administers the HRM/ROT. 65 ILCS 5/8-11-1

The sole issue in this matter is whether the Department is estopped from collecting the local taxes

at issue. "It seems universally recognized that, generally, a State cannot be estopped by the acts and conduct of its officers or agents in the performance of the governmental function of collecting taxes legally due." Austin Liquor Mart, Inc. v. Department of Revenue, 51 Ill.2d 1, 5 (1972)

In Brown's Furniture, Inc. v. Wagner, 171 Ill.2d 410 (1996) *cert. denied*, 519 U.S. 866 (1996) (hereinafter referred to as "Brown's Furniture") the Illinois Supreme Court stated that the doctrine of estoppel is applied against the State only to prevent fraud and injustice. This is especially true when the public revenues are involved. *Id.* at 431 Brown's Furniture concerns a Missouri retailer that alleged that during a telephone call with a Department employee, it was advised that it had no obligation to collect Illinois sales tax on its Illinois sales when, in fact, Brown's was legally obligated to collect the tax. *Id.* at 431-2 The court found that the Department employee who engaged in the telephone conversation with Brown's was unaware of the extent of the taxpayer's activities within Illinois, a key element in determining whether Brown's had sufficient nexus with Illinois to create a use tax collection obligation.

Brown's also alleged that estoppel was appropriate regarding the Department's collection of the taxes at issue. However, the Supreme Court noted that estoppel cannot be asserted against a party not having knowledge of the relevant facts. *Id.* at 432 Based upon this factor and the principle that the State is not estopped by mistakes and misinformation given by the Department's employees, the court concluded that it would be inappropriate to impose the doctrine of estoppel against the Department on the basis of a telephone conversation.

Similarly herein, the taxpayer asserts through affidavits presented at hearing,¹ that the Department's employees, over the telephone, informed the taxpayer that it should be treated as an out of state vendor and charge its customers only the State flat rate of 6.25%. The taxpayer argues for the imposition of estoppel based upon the telephone communications with Department personnel. Just as in Brown's Furniture, the determination of whether the taxpayer owes the tax at issue is a complex, fact sensitive determination. The taxpayer has not established that the Department's personnel had knowledge of all of the relevant facts of the taxpayer's business. For example, the extent to which the Taxpayer maintained an inventory in the State and the timing of movement of merchandise into and out of that inventory was not addressed in the

¹ Taxpayer's Ex. Nos. 1 & 2.

conversations.² Furthermore, this estoppel argument is based upon the presentation of affidavits at hearing. I am unable to give meaningful weight to these affidavits as they are hearsay, and the affiants did not make themselves available for examination at hearing.

Under the Illinois Administrative Code the inventory element is critical to the determination of whether the taxpayer has a collection obligation for the local sales taxes at issue. The applicable section of the code states:

If a purchase order is accepted outside this State but the tangible personal property which is sold is in an inventory of the retailer located within a home rule municipality at the time of its sale (or it is subsequently produced in the home rule municipality) then delivered in Illinois to the purchaser, the place where the property is located at the time of the sale (or subsequent production in the home rule municipality) will determine where the seller is engaged in business for Home Rule Municipal Retailers' Occupation tax purposes with respect to such sale. 86 Admin. Code ch I, Sec. 270.115(b)(3)

Under the certificate of the Director, the Department admitted into evidence the Notice of Tax Liability and the Audit Correction and/or Determination of Tax Due. Section 4 of the ROT Act provides that the Correction of Return issued by the Department is *prima facie* correct and is *prima facie* evidence of the correctness of the amount of tax due as shown therein. 35 ILCS 120/4. Once the Department has established its *prima facie* case by submitting the correction of return into evidence, the burden shifts to the taxpayer to overcome this presumption of validity. Clark Oil & Refining Corp. v. Johnson, 154 Ill.App.3d 773, 783 (1st Dist. 1987). To prove its case, a taxpayer must present more than its testimony denying the Department's assessment. Sprague v. Johnson, 195 Ill.App.3d 798, 804 (4th Dist. 1990) The taxpayer must present sufficient documentary evidence to support its claim for exemption. *Id.*

The taxpayer relies on the fact that the Department's employees were aware of the taxpayer's locations within Illinois. While Illinois offices may be sufficient to establish nexus for other purposes, for HRM/ROT purposes, more than a mere physical presence in Illinois is required. Thus, additional information relating to the terms of the Administrative Code section cited above is required to make a determination regarding a retailer's obligation to include HRM/ROT in its charges to Illinois customers.

² See affidavit of Jane Doe ¶2 (Taxpayer's Ex. No. 1) and affidavit of John Doe ¶2, (Taxpayer's Ex. No. 2) regarding the limited description of taxpayer's operations offered in the telephone conversations.

For these reasons, as in Brown's Furniture, the taxpayer's communications to the Department's employees are not sufficient to support imposition of the doctrine of estoppel.

The taxpayer asserts that an appreciation of another Department regulation is appropriate in this matter. Specifically it cites the regulation found at 86 Admin code ch. I §270.115 (b)(1), which states as follows:

If the purchase order is accepted at the sellers place of business within the municipality *or by someone who is working out of such place of business* and who does not conduct the business of selling elsewhere within the meaning of subsections (f) and (g) of this Section, or if a purchase order which is an acceptance of the seller's complete and unconditional offer to sell is received by the sellers place of business within the home rule municipality or by someone *working out of such place of business*, the seller incurs Home Rule Municipal Retailers' Occupation Tax liability in that home rule municipality if the sale is at retail and the purchaser receives the physical possession of the property in Illinois (emphasis added by taxpayer; Taxpayer's reply brief p. 2)

The taxpayer asserts, for the sake of argument, that the taxpayer must supply the Department with certain information before estoppel can be alleged and the Illinois Administrative Code requires that the taxpayer supply the following information: (1) whether the purchase orders are accepted at the seller's place of business within the home rule municipality or by someone working out of the business located in the home rule municipality; (2) whether it's a retail sale; and (3) whether the purchaser receives the physical possession of the property in Illinois. The taxpayer then goes on to state that the affidavits presented satisfy these requirements, and that if the Department was not provided with enough information to give accurate advice, it should not have given any at all.

The taxpayer did have a remedy in this situation that was legally and practically more sufficient than a purported telephone inquiry. It could have contacted the Department by letter and received a ruling whether it was/or was not subject to the imposition of the HRM/ROT. (86 Admin. Code ch. I §130.1001) Subsection (a) of that provision specifically states that taxpayers may not rely on verbal opinions of the Department's employees. There is nothing in the exhibits or stipulations to even allege that the taxpayer attempted to contact the Department in writing.

As an added argument, the taxpayer asserts that collection of the liabilities would work an injustice against the taxpayer. However, enforcement of a valid tax liability against the party that owes the liability

does not constitute fraud or injustice. The assessments in this matter require that the taxpayer pay tax that was legally owed on its sales. The Department's allegedly incorrect advice has not resulted in the taxpayer owing any tax other than what it would have owed had it properly paid and filed its returns during the periods at issue.

The fact that the taxpayer never collected the tax at issue from its customers is of no consequence. The tax obligation is imposed on the retailer, People's Drug Shop, Inc. v. Moysey, 384 Ill. 283 (1943), and there is no question that the taxpayer is a retailer. Although the law allows the retailer to reimburse itself for its own obligation with the amount of HRM/ROT it collects from its customer, the law does not allow a retailers' non-compliance for its own tax obligation as a remedy for the retailer's failure to collect the tax from its customer.

For the foregoing reasons, it is recommended that this matter be resolved in favor of the Department.

Respectfully Submitted:

Date: November 29, 2001

Barbara S. Rowe
Administrative Law Judge